

1 MARK JOSEPH KENNEY (State Bar No. 87345)

[mjk@severson.com](mailto:mjk@severson.com)

2 JOHN B. SULLIVAN (State Bar No. 96742)

[jbs@severson.com](mailto:jbs@severson.com)

3 SUNNY S. HUO (State Bar No. 181071)

[ssh@severson.com](mailto:ssh@severson.com)

4 SEVERSON & WERSON

A Professional Corporation

5 One Embarcadero Center, Suite 2600

San Francisco, CA 94111

6 Telephone: (415) 398-3344

Facsimile: (415) 956-0439

7 Attorneys for Defendant

8 Homecomings Financial, LLC

9  
10 UNITED STATES DISTRICT COURT

11 NORTHERN DISTRICT OF CALIFORNIA

12  
13 LAURA THOMPSON, etc.,

14 Plaintiff,

15 vs.

16 HOMECOMINGS FINANCIAL, LLC,

17 Defendants.

Case No.: C 07 4046 PJH

**MOTION TO DISMISS AND STRIKE  
PORTIONS OF FIRST AMENDED  
COMPLAINT AND SUPPORTING  
MEMORANDUM**

Hearing Date: January 9, 2008

Time: 9:00 a.m.

Courtroom: 3

Judge: Hon. Phyllis J. Hamilton

Complaint Date: August 7, 2007

Trial Date: Not Set

**NOTICE OF MOTION TO DISMISS AND STRIKE**

Please take notice that on January 9, 2008, at 9:00 a.m., or as soon thereafter as counsel may be heard in Courtroom 3 of the above-entitled court at 450 Golden Gate, San Francisco, California before the Honorable Phyllis J. Hamilton, defendant Homecomings Financial, LLC will, and it hereby does, move:

1. Pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss the second cause of action of plaintiffs' first amended complaint on the grounds that

a. The California Consumers Legal Remedies Act (Civ. Code, §1750 et seq.) does not apply to transactions, such as those alleged in the complaint, involving only the extension of credit; and

b. Plaintiff has not alleged facts showing a violation of the Consumers Legal Remedies Act's specific prohibitions.

2. Pursuant to Fed. R. Civ. P. 12(f) to strike paragraphs 1 and 4 of the first amended complaint's prayer. Those paragraphs seek compensatory, statutory, and punitive damages, relief that is not available under California Business and Professions Code § 17200 et seq. or §17500 et seq., and which plaintiff cannot recover under the Consumers Legal Remedies Act for the reasons mentioned in the accompanying motion to dismiss.

Defendant brings this motion pursuant to Fed. R. Civ. P. 12(b)(6) and (f) on the grounds stated above. The motion is based on this notice, the accompanying memorandum of points and authorities, the first amended complaint, and all other records and papers on file in this action.

DATED: November 16, 2007

SEVERSON & WERSON  
A Professional Corporation

By: /S/  
Sunny S. Huo

Attorneys for Defendant  
Homecomings Financial, LLC

I hereby attest that I have on file all holograph signatures for any signatures indicated by a "conformed" signature (/S/) within this efiled document.

**MEMORANDUM OF POINTS AND AUTHORITIES****I.****INTRODUCTION**

In this putative class action, plaintiff Laura Thompson claims that in making home mortgage loans defendant Homecomings Financial, LLC (“Homecomings”) does not properly disclose to prospective borrowers that Homecomings will pay yield-spread premiums (“YSPs”) to the borrowers’ brokers.

Homecomings moves to dismiss Thompson’s second cause of action under California’s Consumers Legal Remedies Act (Civ. Code, §1750 et seq.; “CLRA”) for two reasons. First, the act does not apply to the extension of credit, such as the making of a home mortgage loan. Thompson does not allege that Homecomings sold any good or service, but only made home mortgage loans. Second, Thompson fails to allege conduct that violates the CLRA’s specific prohibitions, even if the transaction were otherwise covered by the act. For both reasons, Thompson states no claim under the act, and her second cause of action should be dismissed.

Homecomings also moves to strike from the complaint’s prayer two paragraphs (§§1, 4) that seek compensatory, statutory, and punitive damages. Damages are not recoverable under California Business and Professions Code §17200 et seq. (the “Unfair Competition Law” or “UCL”) or §17500 et seq. (the “False Advertising Law” or “FAL”), the statutes on which Thompson bases her first and third causes of action. Thompson cannot recover damages under the CLRA because she fails to state a claim under that statute.

For each of these reasons, the Court should dismiss Thompson’s second cause of action and strike paragraphs 1 and 4 of the first amended complaint’s prayer.

**II.****STATEMENT OF ISSUES TO BE DECIDED**

1. Should the Court dismiss Thompson’s second cause of action because the CLRA does not apply to credit transactions, such as the alleged home mortgage loans?

2. Should the Court dismiss Thompson's second cause of action because the complaint does not allege facts showing that Homecomings engaged in any practice forbidden by Civil Code §1770?

3. Should the Court strike paragraphs 1 and 4 of the first amended complaint's prayer because the relief those paragraphs seek—actual, statutory, and punitive damages—is not recoverable on plaintiff's claims under the UCL and FAL and because plaintiff does not allege a viable claim under the CLRA?

### III.

#### THE COMPLAINT'S PERTINENT ALLEGATIONS

According to the first amended complaint ("FAC"),<sup>1</sup> Homecomings "engages in residential mortgage lending" in California, offering loan programs under which independent mortgage brokers refer prospective borrowers to Homecomings for loans. (FAC, ¶8.)

The brokers are compensated, in part by a YSP that Homecomings pays. (*Id.*, ¶¶2, 3, 9.)

A yield spread premium, or "YSP," is a lump sum paid by a lender to a broker at closing when the loan originated by the broker bears an above-par interest rate. As HUD has explained it:

Payments to brokers by lenders, characterized as yield spread premiums, are based on the interest rate and points of the loan entered into as compared to the par rate offered by the lender to the mortgage broker for that particular loan (e.g., a loan of 8% and no points where the par rate is 7.50% will command a greater premium for the broker than a loan with a par rate of 7.75% and no points). In determining the price of a loan, mortgage brokers rely on rate quotes issued by lenders, sometimes several times a day. When a lender agrees to purchase a loan from a broker, the broker receives the then applicable pricing for the loan based on the difference between the rate reflected in the rate quote and the rate of the loan entered into by the borrower....

Lender payments to mortgage brokers may reduce the up-front costs to consumers. This allows consumers to obtain loans without paying direct fees themselves. Where a broker is not compensated by the consumer through a direct fee, or is partially compensated through a direct fee, the interest rate of the loan is increased to compensate the broker or the fee is added to principal. In any of the compensation meth-

<sup>1</sup> As a motion to dismiss or strike is based on the complaint's allegations, Homecomings states those allegations without comment now as to their truth or falsity and without waiving its right to contest their truth later.

ods described, all costs are ultimately paid by the consumer, whether through direct fees or through the interest rate.

*Shuetz v. Banc One Mortgage Corp.*, 292 F.3d 1004, 1007-08 (9th Cir. 2002), quoting HUD, Real Estate Settlement Procedures Act (RESPA) Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, 64 Fed.Reg. 10080, 10085 (March 1, 1999).

As indicated in the HUD's 1999 Statement of Policy, the YSP "correlates with a higher interest rate than the borrower would otherwise pay on the loan. (FAC, ¶9.)

Thompson claims that under the Real Estate Settlement Practices Act and its implementing regulations, Homecomings is required to disclose any YSP in a Good Faith Estimate that it must give the prospective borrower within three days of receiving his or her loan application. (*Id.*, ¶11.)

According to Thompson, Homecomings "regularly" or "routinely" violates this supposed legal requirement by disclosing the YSP, if at all, only at the closing of the loan. (*Id.*, ¶¶4, 13, 19, 21-24.) Belated or non-disclosure, Thompson says, deprives borrowers of the ability to negotiate for a lower interest rate loan. (*Id.*, ¶4.)

Based on these spare factual allegations, Thompson attempts to allege three causes of action: the first under the UCL, the second under the CLRA, and the third under the FAL.

#### IV.

#### THE SECOND CAUSE OF ACTION SHOULD BE DISMISSED

The Court should dismiss Thompson's second cause of action under the CLRA for two reasons: First, the CLRA does not apply to transactions, such as the making of home mortgage loans, that involve only the extension of credit, not the sale of goods or services. Second, Thompson has not alleged facts showing a violation of the CLRA's specific prohibitions.

##### A. The CLRA Does Not Apply To Credit Transactions

"[N]either the express text of CLRA nor its legislative history supports the notion that credit transactions separate and apart from any sale or lease of goods or services are covered under the act." *Berry v. American Express Pub., Inc.*, 147 Cal.App.4th 224, 233, 54 Cal.Rptr.3d 91 (2007).

1 The CLRA's scope is discerned first from its statutory text. *Freeman v. DirecTV, Inc.*,  
 2 457 F.3d 1001, 1004 (9th Cir. 2006) ("The starting point for [the] interpretation of a statute is  
 3 always its language."); *Shirk v. Vista Unified School Dist.*, 42 Cal.4th 201, 211, 64 Cal.Rptr.3d  
 4 210 (2007) ("We begin with the statutory language because it is generally the most reliable indi-  
 5 cation of legislative intent.")

6 The CLRA's central provision, Civ. Code, §1770, bans various specified practices only if  
 7 "undertaken by any person in a transaction intended to result or which results in the sale or lease  
 8 of goods or services to any consumer." Section 1770 and the rest of the CLRA's provisions do  
 9 not apply to a transaction that does not involve the sale or lease of "goods" or "services," as the  
 10 CLRA specially defines those terms.

11 The CLRA defines "goods" to mean "tangible chattels." Civ. Code, §1761(a). "The  
 12 extension of credit [such as a loan] is not a tangible chattel." *Berry*, 147 Cal.App.4th at 229.

13 Nor is a loan or other extension of credit a sale or lease of "services," a term that the  
 14 CLRA defines to mean "work, labor, and services for other than a commercial or business use."  
 15 Civ. Code, §1761(b). Credit is not a "service" within the CLRA's definition. A loan involves no  
 16 work or labor or any other "service," but only the use of the lender's money.

17 The CLRA's legislative history confirms the fact that it does not apply to extensions of  
 18 credit.

19 Early drafts of section 1761, subdivision (d), defined "Consumer"  
 20 as "an individual who seeks or acquires, by purchase or lease, any  
 21 goods, services, *money*, or *credit* for personal, family or household  
 22 purposes." (Assem. Bill No. 292 (1970 Reg. Sess.) Jan. 21, 1970,  
 italics added.) But the Legislature removed the references to  
 "money" and "credit," before CLRA's enactment, and they do not  
 appear in the current version.

23 *Berry*, 147 Cal.App.4th at 230.

24 By deleting "money" and "credit" from the CLRA's definitional sections, the Legislature  
 25 evidenced its intent to exclude loans from the act's coverage. "[T]he Legislature's deletion of the  
 26 terms 'money' and 'credit' from CLRA's definition of 'consumer' strongly counsels us not to  
 27 stretch the provision to include extensions of credit unrelated to the purchase of any specific good  
 28

1 or service.” *Id.* at 231. “[C]ourts must not interpret a statute to include terms the Legislature  
2 deleted from earlier drafts.” *Id.*

3 Other changes made during the Legislature’s consideration of the CLRA’s early drafts  
4 confirm that deletion of the terms “money” and “credit” was intended to narrow the act’s scope.

5 For example, an early draft of section 1780 gave standing to “[a]ny  
6 consumer who *obtains credit*, or purchases or leases, or agrees to  
7 purchase or lease, goods or services primarily for personal, family,  
8 or household purposes, and who thereby suffers any damage....”  
9 (Italics added.) The draft’s placement of the phrase “obtains credit”  
10 demonstrates the Legislature viewed the extension of credit as a  
11 separate activity from purchasing or leasing goods and services,  
12 rather than an example of it. The final version of section 1780 de-  
13 leted the specific references to activities covered under the act, and  
14 it now confers standing on: “Any consumer who suffers any dam-  
15 age as a result of the use or employment by any person of a method,  
16 act, or practice declared to be unlawful by Section 1770....”

17 *Id.*, at 232.

18 As *Berry* points out, §1770 also evidences the Legislature’s intent that the CLRA not  
19 extend to credit transactions. “Most of the matters in section 1770 appear directed toward the  
20 purchase and lease of tangible goods and services, and none suggests the statutory language cov-  
21 ered extensions of credit unrelated to a specific sale or lease transaction.” *Id.* Moreover, the sec-  
22 tion’s above-quoted introductory phrase, limiting the section’s prohibitions to practices under-  
23 taken in connection with the sale or lease of goods or services, is considerably narrower in scope  
24 than the section’s initial draft, which would have banned the specified practices if “undertaken by  
25 any person in the conduct of any trade or commerce ....” *Id.*

26 Other recent state and federal decisions adopt *Berry*’s careful analysis of the CLRA’s text  
27 and legislative history as well as its conclusion that the act does not apply to credit transactions.  
28 *Van Slyke v. Capital One Bank*, 2007 WL 1655641 at \*3-4 (N.D. Cal. 2007) (CLRA does not  
apply to credit cards); *Augustine v. FIA Card Services, N.A.*, 485 F.Supp.2d 1172, 1174-1175  
(E.D. Cal. 2007); *Fairbanks v. Superior Court*, 154 Cal.App.4th 435, 441-44, 64 Cal.Rptr.3d 623  
(2007) (CLRA does not apply to insurance); *see also McKell v. Washington Mut., Inc.*,  
142 Cal.App.4th 1457, 1488, 49 Cal.Rptr.3d 227 (2006) (CLRA does not apply to home loans).



1 The one decision that has bucked this trend, *Jefferson v. Chase Home Fin. LLC*, 2007 WL  
 2 1302984 (N.D.Cal. 2007), is inapposite here for the same reason Judge Alsup found it “not on  
 3 point” in *Van Slyke*, 2007 WL 1655641 at \*4: *Jefferson* “held that the CLRA did apply to  
 4 financial services connected with mortgages, specifically to a program under which debtors were  
 5 able to prepay their mortgages without penalty. The claim under the CLRA was not directed to  
 6 the extension of credit itself. It was directed at the defendant’s prepaid mortgage practices, a  
 7 financial service provided to debtors ....”<sup>2</sup>

8 Here, Thompson complains only about the loan she got, allegedly at a higher interest rate  
 9 because she supposedly was not informed, in a timely manner, about the YSP paid her broker.  
 10 She mentions no “service”; just the extension of credit. Without facts to show that the disputed  
 11 transaction was intended to or did result in the sale or lease of goods or services, Thompson’s  
 12 second cause of action fails to allege a viable claim under the CLRA.<sup>3</sup>

#### 13 **B. Thompson Has Not Alleged Violation Of The CLRA’s Prohibitions**

14 Unlike California’s UCL, the CLRA does not prohibit all “unfair” acts—even in transac-  
 15 tions to which the CLRA applies. Instead, the CLRA’s key provision, Civ. Code, §1770, declares  
 16 19 specifically defined practices to be unlawful, and §1780 gives a private right of action to con-  
 17 sumers injured by those specific practices. Thompson fails to state a viable claim under these  
 18  
 19

20 <sup>2</sup> *Hitz v. First Interstate Bank*, 38 Cal.App.4th 274, 286-88, 44 Cal.Rptr.2d 890 (1995) is  
 21 distinguishable for the same reason. *Hitz* held the CLRA applied to a bank’s practice of charging  
 22 late and overlimit fees on credit cards because the cards had a convenience feature (allowing the  
 23 holder to buy without carrying or using cash), a service apart from the cards’ use as a means for  
 24 the extension of credit. A home mortgage loan, like those involved in this case, offers no such  
 25 “convenience feature.”

26 <sup>3</sup> Thompson’s conclusory allegations that her dealings with Homecomings were “transac-  
 27 tions” as defined in Civil Code §1761(e) and that Homecomings performed “services” for her, as  
 28 defined by Civil Code §1761(b) are insufficient to avoid dismissal. (See FAC, ¶¶52, 53.) As the  
 Supreme Court has recently re-emphasized, “a plaintiff’s obligation to provide the ‘grounds’ of  
 his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation  
 of the elements of a cause of action will not do.... Factual allegations must be enough to raise a  
 right to relief above the speculative level ....” *Bell Atlantic Corp. v. Twombly*, \_\_ U.S. \_\_,  
 127 S.Ct. 1955, 1964-65 (2007). Allegations of legal conclusions such as those recited in  
 paragraphs 52 and 523 of the first amended complaint no longer suffice, if they ever did, to meet  
 the pleader’s burden; instead, facts must be averred to show that those elements of Thompson’s  
 claim are, in fact, met. *Mitan v. Feeney*, 497 F.Supp.2d 1113, 1126 (C.D. Cal. 2007).



1 provisions because she alleges no facts showing that Homecomings committed any of the  
2 practices forbidden by section 1770.

3 Paragraph 54 of the first amended complaint avers, in conclusory fashion, that Homecom-  
4 ings violated the CLRA “includ[ing] but not limited to” Civil Code §1770(a)(1)-(3), (5), (9), (10),  
5 (14), (16), (18), and (19). No facts are stated to show how Homecomings acted in a manner so as  
6 to violate any of these provisions. The allegation is mere “labels and conclusions.” It does not  
7 meet Fed. R. Civ. P. 8’s requirement of a statement of the grounds on which plaintiff is entitled to  
8 relief. Instead, the complaint must allege *facts* that “raise a right to relief above the speculative  
9 level.” *Twombly*, 127 S.Ct. at 1965.

10 Moreover, non-disclosure of a probable YSP payment—the gist of what Thompson claims  
11 Homecomings did wrong—is not conduct that violates the subparts of §1770(a) cited in the first  
12 amended complaint’s paragraph 54—or any other, unmentioned CLRA provision.<sup>4</sup>

13 Section 1770(a)(1)-(3) and (5) ban passing off goods or services as those of another,  
14 misrepresenting the source, sponsorship or approval of goods or services, or affiliation,  
15 connection or association of the seller. Thompson does not allege that Homecomings engaged in  
16 any such conduct. She avers a non-disclosure of the YSP, not an affirmative misrepresentation of  
17 source or affiliation.

18 Similarly, §1770(a)(9) and (10) ban advertising goods or services either without the intent  
19 to sell them as advertised or to supply reasonably expectable demand. Thompson does not allege  
20 that Homecomings advertised loans or that it failed to supply any advertised loans to those who  
21 applied and qualified for them.

---

22  
23 <sup>4</sup> Civ. Code §1770 is the CLRA’s only substantive provision. The paragraphs of that statute  
24 that are not cited in the first amended complaint’s paragraph 54 proscribe: (a) false designations  
25 of geographic origin; (b) representing that goods are original or new if they are used or  
26 reconditioned; (c) representing that goods or services are of a particular standard, quality or  
27 grade, if they are of another; (d) disparaging another seller’s goods, services or business;  
28 (e) advertising furniture without revealing it is unassembled; (f) advertising the price of  
unassembled furniture without also indicating its assembled price; (g) saying a part, replacement  
or repair is needed when it is not; and (h) saying the customer will get a rebate or discount if it is  
contingent on an event that will occur after the transaction is consummated. Civ. Code,  
§1770(a)(4), (6)-(8), (11), (12), (15), (17). Not disclosing a YSP does not violate any of these  
portions of the statute.

1 Section 1770(a)(14) and (16) ban affirmative misrepresentations about the rights, reme-  
 2 dies or obligations a transaction confers or involves or saying the subject of the transaction has  
 3 been supplied when it has not been. Thompson does not claim Homecomings misstated Thomp-  
 4 son's rights, obligations or remedies under her loan. Instead, she claims that Homecomings did  
 5 *not* tell her that it was paying her broker a YSP. Likewise, Thompson does not contend Home-  
 6 comings failed to supply the "subject" of her transaction—a home mortgage loan—or told her  
 7 that the loan had been supplied before it actually was.

8 Section 1770(a)(18) bans misrepresenting a salesperson's authority to negotiate final  
 9 terms of the transaction. Thompson alleges no such misstatement by Homecomings.

10 Section 1770(a)(19) bans inserting unconscionable provisions in contracts. Thompson  
 11 does not claim any provision of her loan was unconscionable.

12 In short, Thompson does not allege facts which show the violation of any of the cited sub-  
 13 parts of Civil Code §1770. Hence, Thompson fails to state a claim under that section or the rest  
 14 of the CLRA.

## 15 V.

### 16 THE PRAYER FOR DAMAGES SHOULD BE STRICKEN

17 Paragraphs 1 and 4 of the first amended complaint's prayer seek "[a]ctual," "[s]tatutory,  
 18 exemplary and punitive damages." These paragraphs should be stricken as Thompson is not  
 19 entitled to damages of any kind in this suit.

20 Damages are not recoverable under the UCL or FAL, and thus are not relief that may be  
 21 awarded on Thompson's first or third causes of action. "A UCL action is equitable in nature;  
 22 damages cannot be recovered. ... [U]nder the UCL, '[p]revailing plaintiffs are generally limited  
 23 to injunctive relief and restitution.'"<sup>5</sup> "Plaintiffs may not receive damages, much less treble  
 24

25  
 26  
 27 <sup>5</sup> *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134, 1144, 131 Cal.Rptr.2d 29  
 28 (2003), *citing Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal.4th  
 163, 179-80, 83 Cal.Rptr.2d 548 (1999); *Bank of the West v. Superior Court*, 2 Cal.4th 1254,  
 1266, 10 Cal.Rptr.2d 538 (1992); *accord: E.W. French & Sons, Inc. v. General Portland, Inc.*,  
 885 F.2d 1392, 1401-02 (9th Cir. 1989).

